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In the Supreme Court of the United States

October Term, 1983

JAMES T. LICAVOLI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. Whether due process and basic fairness were grievously offended when the government was unnecessarily permitted to affirmatively and dramatically prove: (A) that in issuing the warrant authorizing the monitoring of conversations a Federal Judge, the Attorney General and the FBI were fully convinced a named individual would be personally participating in conversations in his home involving serious and violent crimes. And (B) that the Attorney General had been fully convinced by the FBI and others that certain prosecution witnesses, as well as, their families, not only deserved but were actually entitled to be protected so as to prevent this individual from visiting physical harm upon them.

II. Does a trial court err, or abuse its discretion, when it fails to grant the accused a severance in a situation where it was clearly evident compelling prejudice would be visited on him that would outweigh all interest in judicial economy and other relevant considerations.

III. Whether the defendant Licavoli's right of confrontation and hearsay rule were violated by the admission of considerable evidence showing the contents of various conversations had by a non-testifying declarant (a co-defendant at the trial) with the witnesses Aratari, Guiles and Lanci, during which Licavoli was repeatedly credited with ordering the murder of Danny Greene.

IV. Whether in a multiple defendant RICO conspiracy prosecution it is proper to charge the jury that a defendant could be found to have committed the

charged predicated acts of (a) conspiracy to murder a particular individual and (b) the murder of this same individual; as well as, the RICO conspiracy itself on an aider and abettor theory.

V. Whether a charge that exposes an accused to being convicted by less than the unanimous concurrence of all the jurors violates the sixth amendment right to a unanimous verdict.

VI. Whether the evidence in a RICO conspiracy prosecution that at best only shows a particular defendant committed *only* one of the alleged predicate acts, or offenses, is legally sufficient to support a verdict finding such guilty as charged.

A. Whether "conspiracy to murder" can properly be regarded as a predicate act in a RICO conspiracy prosecution.

B. Whether the two predicate acts requirement of 1962 (d) can be satisfied by proof of the State offenses of conspiracy to murder *and* murder of a particular person, where under State law upon conviction of the murder charge the conspiracy offense merges therewith.

C. Whether the requirement, under 18 U.S.C. §1961 (1) (A), that a State offense must be "chargeable" and "punishable" can be satisfied by proof of offenses that cannot be separately punished.

PARTIES BELOW

The caption of this case not containing the names of all parties whose convictions are sought to be reviewed, the following co-defendants' names are disclosed:

(1) Anthony Liberatore

(2) John Calandra

(3) Pasquale Cisternino

(4) Ronald Carabbia

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, James T. Licavoli, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final on January 9, 1984.

OPINION BELOW*

The Opinion of the Court of Appeals (Appendix "B", *infra*, pp. A2-A25) is reported as *United States v. Licavoli, et al.*, 725 F.2d 1040 (6th Cir. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1984. Upon application by petitioner the time for seasonably filing this Petition was extended until April 8, 1984 (See Appendix "A", at A1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant statutory provisions involved are: Federal Rules of Criminal Procedure, Rules 14, 30 and 31(a); Federal Rules of Evidence, Rules 404 (a) and 801 (d) (2) (E); Ohio Revised Code §§2923.01 (A) (1) (2), 2923.01 (F) and 2923.01 (G); 18 U.S.C. §2 (a), 18 U.S.C. §2 (b), 18 U.S.C. §1961 (1) (A) and 18 U.S.C. §1962 (d). (See Appendix "E", pp. A73.)

STATEMENT OF THE CASE

I

In the trial of this case the government sought to prove that James Licavoli, the petitioner, violated 18 U.S.C. §1962

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*Whenever reference is made to a page in the transcript of the proceedings in the trial court, it will be designated (Tr. .....). References to the Joint Appendix filed in the Court of Appeals are (J. A. .....). Reference to the Appendices to this Petition are noted as Appendix A, B, C, and D, with a page reference of A .....

(d) by conspiring to violate 18 U.S.C. §1962 (c). As against Licavoli, the charge was amplified by the very specific contention that he was conspiratorially involved in conducting the affairs of an enterprise, as that term is defined in 18 U.S.C. §1961 (4), through a pattern of racketeering activity—that is, through the commission of two (2) state offenses: *conspiracy to murder* and the *murder* of one Danny Greene.

Prior to the trial the Court ruled that Licavoli's acquittals on the bribery charges barred the government from using any of the bribery evidence against him for any purpose. However, as is made most clear below, the Court adamantly refused to separate Licavoli's trial from those defendants (*i.e.*, Liberatore and Ciarcia) against whom the bribery evidence was admissible as proof of "predicate acts" and as proof of the charged "enterprise". It also happened that the considerable bribery evidence was admitted as proof these bribery charges were committed in furtherance of the affairs of that enterprise *as charged in the indictment.*

Most critical to this cause then is the trial court's written response to Licavoli's post-trial contention that:

> The court erred in denying this defendant's various objections to the use of *his name* in connection with the stolen FBI documents that related solely to the various acts of bribery charged in this cause against certain co-defendants. This evidence (which disclosed in glaring and indelible terms the rather gross fact that Licavoli had been, and was being, very actively investigated by the FBI, doubtless as a suspected criminal) in addition to impermissibly putting his character in issue, created other powerful negative inferences that could in no way be addressed by this defendant consistent with his right of confrontation and his entitlement to due process.

Here, the trial Judge reasoned, in clear and unambiguous prose, that:

> In developing the proof of bribery with reference to confidential FBI documents stolen from the FBI files by Geraldine Rabinowitz and given to defendant Kenneth Ciarcia, the government called Geraldine Rabinowitz, a file clerk in the Cleveland office of the FBI. Shortly after her testimony began, the court gave this limiting instruction to the jury:
>
> * * * * *
>
> > The jury, therefore, will not consider testimony or evidence received from Geraldine Rabinowitz as applying to defendants Licavoli, Calandra, Cisternino, or Carabbia. You may proceed Mr. Poretz.
>
> Tr. at p. 201. It was anticipated that some of her testimony would refer to Mr. Licavoli. This instruction, therefore, informed the jury that none of the testimony or evidence so received from Geraldine Rabinowitz was to be considered as applying to defendant Licavoli.
>
> * * * * *
>
> Thereupon she mentioned the names "James Licavoli, Anthony Liberatore, and himself, Kenneth Ciarcia." Mr. Ciarcia also told her that Mr. Licavoli went by the name of "Jack White."
>
> After checking certain files at the Cleveland FBI office, she told Mr. Ciarcia there was . . . "an active investigation on Mr. Licavoli."
>
> Upon persistent inquiry of Mr. Ciarcia, she testified, she eventually obtained copies of several reports on James Licavoli and turned these over to Mr. Ciarcia. Subsequently, Mr. Ciarcia said he wanted additional information on Mr. Licavoli so that there could be a comparison of numbers on the report. She said that

she obtained another report on Mr. Licavoli and gave it to Mr. Ciarcia.

The references to Mr. Licavoli were an integral part of Geraldine Rabinowitz's testimony. Any effort to separate or delete these Licavoli references would have impaired if not destroyed the content of her testimony. Moreover, it would have been impractical, if not impossible, for her to attempt, pursuant to instructions, to substitute the term "another person" in place of the name James Licavoli. (J. A. 170-172).

This factual background, coupled with the indisputable finding by the trial court that the use of Licavoli's name was such an integral part of the central bribery witness' evidence its elimination would have "impaired if not destroyed its content" (*Ibid.*), makes the position taken by the Court of Appeals on this point a "cop-out". Here reference is made to the absolutely horrible conclusion, by the Sixth Circuit, that:

> [The] testimony regarding the other defendants in connection with the circumstances of the bribery was *tangential,* and overshadowed by the major role in the events played by Liberatore and Ciarcia. *The slight potential prejudice to defendants Licavoli,* Calandra and Cisternino in this case *by these tangential references is outweighed by the judicial and societal interests in trying all of the defendants together.* We hold that the trial judge did not abuse his discretion in denying defendants' motion for severance. (*Licavoli,* at 1052; Appendix "B", at pp. A21-A22.)

II

During the trial Ferritto absolutely refused to testify and was declared "unavailable" as a witness. This prompted the Court, despite most vigorous and persistent objections, to allow the government, under favor of Rule 804 (a) (1), to read a segment of the testimony given

by Ferritto during Licavoli's state murder trial. The wrongs involved in reading Ferritto's testimony against Licavoli were compounded by the fact that testimony given by Ferritto at other trials in which Licavoli was not a defendant, was also read to the jury.

The utilization of this procedure was the subject of other and further Motions for Severance. In so doing, hearsay and confrontation arguments were punctuated by the contention that the jury perforce would be confounded by this evidence and that no instruction could possibly insure its correct compartmentalization. Also, the point was made that the defense cross-examination of Ferritto at the state court trial was not tailored to meet the "enterprise" aspect for which the government was able to utilize this evidence (Tr., pp. 1500-1517, 1591-1614).

III

Other relevant facts show the Court allowed the government to repeatedly establish that the monitoring devices placed in Licavoli's home were pursuant to court order and that all of the protected witnesses and their families, in the opinion of the Attorney General, absolutely needed to be protected from Licavoli (Tr., pp. 5429-5431). And, the Court allowed the government to compellingly demonstrate and, otherwise wilfully insinuate, the numerous documents for which the FBI clerk was bribed were but a small segment of the investigative files compiled over the years on the "criminal" activities of Licavoli. Still other proof showed the list of informers was specifically sought by the "bribers" so they could interpret these various "Licavoli" documents. Since this fact was developed over Licavoli's protest it emphasizes the extent to which he was devastated by evidence that was clearly inadmissible against him.

The fact that none of the bribery evidence would have been admitted *against* Licavoli had he been tried

alone aggravates the prejudice he was literally required to endure. This fact becomes even more manifest in view of the fact that Liberatore was actually *credited* with having told Aratari more than once *after* Greene's death that *if they killed the rest of the Irish crew they would have the town and Licavoli would not know about it.* Obviously, this statement hardly shows Licavoli had a stake in their ventures.

REASONS FOR GRANTING THE WRIT

The Court most assuredly should review the rulings made below, first of all because in some respects they strike at the very heart of an individual's right to be convicted, if at all, in a fair trial. And, because some of the critical rulings and interpretations rendered below are in serious conflict with settled precedents developed in this court for application in RICO prosecutions.

For starters in this case, despite the precise pronouncements in *United States v. Turkette,* 452 U.S. 576 (1981), that a RICO enterprise requires proof of "an entity separate and apart from the patterns of activity in which it engages" (*Id.*, 583) that functions "as a continuing unit" (*Ibid.*), the Court below is convinced that "the enterprise element, in the light of Turkette has become a fiction. . . ." And, that "the two predicate offenses are the 'Enterprise' ". As that court saw it, "[a]ll that is now required is the commission of two predicate offenses . . . . No further indicia of 'Enterprises' is now necessary." *Licavoli,* 725 F.2d, at 1053; Appendix "B", at A25.

This ruling obviously conflicts with *Turkette.* Since no other circuit has articulated this notion, it puts the Sixth Circuit in open conflict with *United States v. Riccobene,* 709 F.2d 214 (3rd Cir. 1983) and *United States v. Cauble,* 706 F.2d 1322 (5th Cir. 1983). Also see *United States v. Lemm,* 680 F.2d 1193 (8th Cir. 1983) and *United States v. Bledsoe,* 674 F.2d 647 (8th Cir. 1982).

Also, as various other arguments made below show, the Petitioner was actually prevented from having a fair trial because it was much easier to subordinate due process for him to "competing societal goals of efficient and speedy trials" (*Licavoli*, 725 F 2d at 1051, Appendix "B", at A21).

The argument is made below (Number I) that there is no way any jury could properly accept all the evidence in this case that was so limited and qualified by countless instructions for any light it might shed on the narrow purposes for which it was admitted and reject its grossly prejudicial impact in all other areas. For our part, the metaphysical acumen capable of making discriminations so subtle and sophisticated, a feat beyond the compass of ordinary minds, simply cannot be imputed to the jury that convicted Licavoli. See *Shepard v. United States*, 290 U.S. 96, 104 (1933).

This is particularly so here because the constantly reverberating clang of the impermissable uses to which this evidence may have been put is more than sufficient to drown out the far weaker sounds made by the effect of the Court's special instructions. Stated still another way, if there are limits on the powers of jurors—or even Judges and the rest of us—to keep interconnected thoughts separated, then those limits surely were exceeded here. Since any authorized use of this evidence, particularly the bribery evidence, shaded so closely and uncontrollably into forbidden areas it is a safe assumption that the Court simply asked too much of these jurors when he asked them to perform, what was said to be, "a mental gymnastic which is beyond, not only [a jury's] powers, but anybody's else." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

Since some of the evidence, particularly the bribery evidence, was not properly admissible against Licavoli for any purpose, the argument is made (No. II) that the Court

abused its discretion in failing to sever Licavoli for trial from those Defendants against whom the bribery evidence was most essential. The prejudice to Licavoli resulted, first of all from the spillover, or slop over, effect caused by this bribery evidence. And, it resulted, not only in portraying him as a sinister person, but in enhancing the risk (since his name was indeed centralized throughout the bribed for documents) that the government's enterprise theory actually gained still another *unentitled* benefit in its wake.

In the next argument (No. III), the points hopefully made show there was insufficient independent proof of conspiracy as between Licavoli and Liberatore to justify the admission of certain testimony under Rule 801 (d) (2) (E). It is further argued that Licavoli's confrontation rights were not satisfied. *Dutton v. Evans*, 400 U.S. 74 (1970).

The attempt is then made (No. IV) to show there are critical and discernible distinctions that must be made as between a conspirator and an aider and abettor. The upshot of our analysis is that while *Pinkerton v. United States*, 328 U.S. 640 (1946), makes all conspirators liable for crimes committed in furtherance of such conspiracy, an agreement to violate the law remains the gist, or gravaman, of the offense and is an indispensable element. Since one can be an aider and abettor and not a conspirator, the verdict cannot survive the meaningful possibility that the jury reasoned Licavoli was only an aider and abettor and need not be a conspirator.

Other arguments (Nos. V and VI) raise the point that under the instructions given the jury could return a guilty verdict against Licavoli that lacked the unanimous concurrence of all the jurors as to any specific theory. And, that the evidence is insufficient for a number of reasons to support a finding that Licavoli was guilty of the charged offense.

I. Fundamental Due Process and Basic Fairness Were Grievously Offended When the Government Was Unnecessarily Permitted to Affirmatively and Dramatically Prove: (A) That in Issuing the Warrant Authorizing the Monitoring of Conversations That Would Take Place Inside Licavoli's Home, a Federal Judge, the Attorney General and the FBI Were Fully Convinced Licavoli Would Personally Be Participating in Conversations Involving Serious and Violent Crimes. And (B) That the Attorney General Had Been Fully Convinced by the FBI and Others That Certain of Its Witnesses, As Well As Their Families, Not Only Deserved but Were Actually Entitled to Be Protected So As to Prevent Licavoli From Visiting Physical Harm Upon Them.

(A)

Here, we start with the idea that Licavoli most assuredly did *not* put his character in issue as is required by Rule 404 (a), Federal Rules of Evidence, as condition precedent to an affirmative attack being made on it. Yet, it can hardly be denied the impact of the evidence being centralized had the unavoidable effect of portraying Licavoli to the jury as an out and out public menace for whom guilt was such a foregone conclusion in the eyes of our government that the trial itself was a mere formality.

Thus it is most significant the various monitoring agents were able to emphasize with the court's blessings, they were acting under Court order *and* that one of the limitations in the order restricted them to only monitoring these conversations that related to "criminal activity." (Tr., pp. 6018, 6033-6034).

In arguing against the admission of any of this evidence, the following cogent points were made by the defense: the court order was not under challenge before the

jury, hence, no need existed to show what was done had the prior approval of the court. And, just as surely there was absolutely no need to tell the jury these agents were to only listen to conversations related to "criminal activities". This indication carried with it the unavoidable and irrepressible message that these trained agents regarded anything actually heard as relating to "criminal activities" (*Id.*, 6023). Also, the contention made then, and now, is that the government's resort to this egregious procedure was both deliberate and unnecessary (*Id.*, 6024). Finally, in the midst of all this, not only was Rule 404 specifically called to the court's attention (*Id.*, 6028), the court was informed again that counsel should not be held responsible for the questions asked by other counsel that emphasized the wrong this debacle visited upon Licavoli (*Id.*, 6029-6030).

(B)

More than once the Court charged the jury that the U.S. Attorney General had in fact made the critical determination that the mere willingness of certain witnesses to testify against Licavoli "would place his life or person or the life or person of a member of his family or household in jeopardy" (See Tr., 5429-5431). The pernicious inference that quite predictably emerged from these instructions translates into a sort of *judicial vouching* for the integrity of the Administration's decision to grant the annuities, and other meaningful considerations (including in some instances absolution) that were given these admitted criminals.

All this makes it most clear Licavoli was victimized by this unfortunate tactic as well.

II. Where It Was Most Evident Compelling Prejudice Would Be Visited, As It Was Here, on an Accused That Would Outweigh All Interest in Judicial Economy and Other Relevant Consid-

erations, a Trial Court Errs, or Abuses Its Discretion, When It Fails to Grant the Accused Victimized Thereby a Severance.

Here we refer to the prejudicial spillover that perforce resulted from evidence relating to various crimes and acts not charged against this defendant and from other evidence only admissible against other defendants. Also, there was unavoidable confusion of the evidence admissible against Licavoli with that admitted only as against other defendants.

It is also contended that the joint trial of Licavoli on the RICO conspiracy charge based on *only* the predicate acts involving (1) conspiracy to murder and (2) the murder of Danny Greene, along with co-defendants Liberatore and Ciarcia, against whom certain additional predicate acts (*i.e.*, the bribery charges) were also litigated, was grievously predjudicial to Licavoli. Not the least of the reasons why this is so is because necessarily there was such a confusion of charges, evidence and defendants as to make the proper compartmentalization thereof far too risky a proposition.

Here, it is most relevant that even before this trial commenced, the joint trial of these defendants (most of whom had been acquitted on the Bribery charges that would be centralized in the trial) clearly foreshadowed that there would be confusion of the evidence and resulting prejudice particularly to Licavoli—one of those who had been acquitted. This fact the trial court fully recognized.

The above described circumstances were aggravated not only by virtue of Ferritto's refusal to testify and the debacle that developed as a consequence, but also by the fact that Licavoli's name was at the fulcrum of the various requests made of the "bribed" FBI clerk for the documents that were in fact stolen by her.

At least this much is certain, it cannot be denied that had Licavoli been tried *without* the bribery defendants, the government would *not* have been the beneficiary of the numerous unentitled, devastating inferences that resulted from the "enterprise" theory submitted to the jury over Licavoli's objections. This theory, in our judgment, unavoidably made Licavoli privy to these acts of Bribery despite his having been prevoiusly acquitted of those offenses. This idea becomes even more persuasive in the light of the court's charge which indicated one of the elements the government was required to prove was that "two or more of the persons named as defendants or co-conspirators . . . *conspired* together to violate 18 U.S.C. §1962 (c) by being associated with an enterprise engaged in activities . . . the purpose of which was to control the crime activities in various cities in the Northern District of Ohio by means of *bribery* and other activities." (Tr., 24) (Emphasis supplied).

Given the aforementioned charge, especially when read in the light of other instructions given by the Court, the conclusion is inescapable that the jury may very well have predicated its findings as to the existence of the "enterprise" to some significant degree on the overwhelming proof of bribery involving documents showing Licavoli was being vigorously, and unrelentingly, investigated by the FBI. To the extent that this happened, the conclusion that Licavoli was victimized by the charge itself, the bribery evidence and its relationship to the "enterprise" is inescapable.

Also, in light of its dubious probative value (we contend it lacked any), the Court's admission of evidence showing Licavoli was *the* person whose investigative reports were sought, stolen and "sold" to certain of the alleged coconspirators likewise visited irreparable harm to Licavoli's quest for due process and a fair trial. These flaws also had the pernicious effect of putting Licavoli's char-

acter in evidence in a way that could not even possibly be addressed by the defense.

Our critical assailment also includes the Court's refusal to eliminate from the evidence testimony showing that what those defendants charged with the predicate acts of Bribery (*i.e.*, Liberatore and Ciarcia) had sought from the FBI clerk were *recent* criminal investigative reports concerning James Licavoli. This circumstance related to, and formed the basis for the unavoidable inference that the considerable quantity of materials that were in fact stolen were document accounts of criminal activities involving Licavoli. If not that, we certainly know, that *all* the documents were offered as investigative reports that could be related to Licavoli. This point applies directly to the informer lists, which were, according to the evidence, purposefully sought as an aid to interpreting the various sets of Licavoli documents in which informants were referred to by code numbers.

Predictably the government will surely make the facile argument that any danger of possible misuse by the jury, or any unentitled advantage the government could have otherwise gained at Licavoli's expense, were totally eliminated by the Judge's various charges. For our part, however, the Bribery evidence could only have overwhelmed the judgment of the jury. If not that, it surely made it extremely unlikely they considered Licavoli's guilt or innocence dispassionately and in isolation from such evidence and its pervading impacts—as they should have.

Even this is not all, and this is the real point here, the conclusion is inescapable that the jurors relied on the Bribery evidence in declaring Liberatore and Licavoli were co-conspirators.

III. The Admission of Considerable Evidence Showing the Contents of Various Conversations Had by a Non-Testifying Declarant (a Co-Defendant at

the Trial) With the Witnesses Aratari, Guiles and Lanci, During Which Licavoli Was Credited With Ordering the Murder of Danny Greene, Violated Licavoli's Right of Confrontation and the Hearsay Rule.

We concede that under the co-conspiracy exception to the hearsay rule testimony as to extrajudicial statements may be admitted if it is established, by evidence other than such hearsay, that the accused (here, Licavoli) was involved in a conspiracy with the declarant (in this case Liberatore) and that the statements were made in furtherance of such conspiracy. *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969). Also see Federal Rules of Evidence, Rule 801 (d) (2) (E). This rule, which certainly is not of recent vintage (*Lutwak v. United States*, 344 U.S. 604 [1953]), does not exist as though oblivious to values implicit in the "accused's right to be confronted by the witnesses against him."

The fact that these values must be reckoned with in a meaningful way was made most clear in *California v. Green*, 399 U.S. 149 (1970). Here this court noted that "more than once [it had] found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception" (*Id.*, 155).

At this juncture, we are here concerned with the various statements supposedly made by Liberatore to Aratari and Guiles, concerning Licavoli, some of which were commented on in their presence by Lanci and further embellished. Illustrative of the testimony being referred to and its tenor are the following selected segments of Aratari's testimony dealing with *some* of his asserted conversations with Liberatore:

(1) "He [Licavoli] has two guys on him now, and they need a backup team. Mr. Licavoli wants

it done now, wants Greene's job. . . [done] now and they are taking too much time" (Tr., 3118).

(2) "Mr. Liberatore says if you get Danny Greene you'll have anything in this town you want. My son, you and I will take over this town and Jack White (Licavoli) won't even know about it" (*Ibid.*).

(3) "Well, at that time, Mr. Lanci, Tony Liberatore—I don't know how to explain this—but through the orders of Jack White, this is what he told me—" (Tr., 3157).

(4) "I was already looking for the Irish crew when they sent me up for—Mr. Liberatore . . . they took me off the other case and put me on the Greene case, because . . . he [Liberatore] Mr. Licavoli wants this done right away. It can't wait." (Tr., 3167).

(5) "Mr. Liberatore told me Danny Greene is a pretty strong person in this town. He's got control of the West Side. He's got the gambling. He's got the barbut, the vending machines. He's got the music, the prostitution, dope. And he's even into unions. Jack White [Licavoli] is very upset. Jack White is afraid of him, and Jack White wants him out of the way" (Tr., 3199).

(6) "Liberatore told me the reason they want—Licavoli, Liberatore—want Danny Greene's son out of the way, because if he goes there is going to be a vendetta" (Tr., 3202).

(7) ". . . Mr. White wants him out of the way now" (Tr., 3216).

(8) ". . . [I told Vic that Licavoli is] the number one man, and . . . Liberatore told myself and Vic he was second in command" (Tr., 3217).

(9) "Mr. Liberatore says well we want you off all them people and Mr. White wants you to get on Danny Greene with the other two" (Tr., 3263).

(10) "The same kind of conversation . . . [Took place at a third meeting at the Donut Shop]. Mr. White's getting anxious, you know, can you guys get . . . [Greene]" (Tr., 3275).

(11) ". . . Mr. Liberatore says White is pleased, we're all pleased. Now we got to the other guys, meaning Keith Ritson, O'Donnell, McTaggert and Danny Greene's son" (Tr., 3382).

(12) "Well, that discussion was about everybody on the hill [i.e. Little Italy] was well pleased, especially Mr. White" (Tr., 3385).

All of the above quotes come directly from Aratari's direct examination, and there were others. It should be further understood that some of these supposed conversations took place in the presence of either Lanci or Guiles—or both of them. Thus their testimony as to these various conversations added further weight to the adverse effect of this evidence.

In our judgment, there was simply no evidence from which the Court (Tr., 3108-3109) or the jury could ever conclude that these various statements, supposedly made by Liberatore to Aratari, were made "with the knowledge and on behalf of" Licavoli. See *United States v. Lawson*, 523 F.2d 804, 806 (5th Cir. 1973).

A. Where Evidence Originating With a Non-Testifying Declarant Is Offered Against an Accused, the Prosecution Must Demonstrate Such Evidence Has an Independent "Indicia of Reliability".

Again, the thrust of Licavoli's position is that the jury's consideration of the testimony concerning the con-

versations and remarks being centralized in this argument violated both his right of confrontation and the hearsay rule. As background for these contentions it should be noted, as was stated in the plurality opinion in *Dutton v. Evans*, 400 U.S. 74 (1970), that "the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of the fact [has] a satisfactory basis for evaluating the truth of the prior statement" (*Id.*, 89).

In our view, the statements attributed by these various witnesses to Liberatore contained the implied assertion that Licavoli was somehow privy to Liberator's activities. The truth of this implication depends not only on whether Liberatore made the statements attributed to him, but on whether the statements (if made) were reliable. This question turns on the answers as to (1) whether there was "a satisfactory basis for evaluation" their truth (*California v. Green*, 399 U.S., at 161); (2) whether cross-examination could have possibly exposed the statements, if made, to be unreliable (*Dutton v. Evans*, 400 U.S., at 89); and (3) whether the statements themselves contained a sufficient "indicia of reliability" (*Ibid.*).

It may very well be, as the testimony of Lanci and Guiles tends to show, that some of these statements *may* very well have been made by Liberatore. But this fact hardly furnishes a satisfactory basis for crediting the underlying truth of the statements themselves. This is so for a number of reasons including the idea that if the conversations did take place, Liberatore, for his own reasons (including a possible desire to camouflage some ulterior motives or to merely add "prestige" to the undertaking in the eyes of Aratari) may have deliberately made it appear that he acted with Licavoli's blessings. *See Park v. Huff*, 493 F.2d 923, 931-932, *reversed on other grounds*, 506 F.2d 849 (5th Cir. 1974).

B. The Admission of Extrajudicial Statements Imputed by Prosecution Witnesses to a Non-Testifying Declarant, Which Statements Were "Crucial" to the Prosecution and "Devastating" to the Defense, Constitutes a Violation of the Right of Confrontation.

As to this point, it is beyond dispute that the same consideration which generates the hearsay rule supports and animates the right of confrontation. Yet, it seems to be all too clear that any apparent similarity of values as between the rule and the right, does not result in the exclusion of all hearsay that may be violative of the confrontation clause, any more than it makes admissible all testimony that qualifies as an acceptable exception to the hearsay rule.

At least this much is clear, Liberatore, the asserted declarant, could not be subjected to cross-examination, which would have at least exposed his demeanor, and possible lack of credibility to the scrutiny of the jury. Hence, the "mission" of the confrontation clause (usually insured by cross-examination) could not be vindicated here. Granted, it is also true that a failure to serve this confrontation value may not be fatal where the hearsay testimony is neither "crucial" to the prosecution, nor "devastating" to the defense. *Dutton v. Evans*, 400 U.S., at 85, 87 (1970). Here, however, it could not be more obvious, the evidence being assailed was both "crucial" and "devastating". Not only this, unlike the statements made in *Dutton*, the statements made here were not spontaneous, but were in the form of an express assertion that in no way carried with it a caution against it being given undue weight (*Id.*, 87-89).

For these reasons the admission of the statements referred to above must be viewed as violations of the confrontation clause.

IV. In a Multiple Defendant RICO Conspiracy Prosecution It Is Improper to Charge the Jury That a Defendant Could Be Found to Have Committed the Charged Predicated Acts of (a) Conspiracy to Murder a Particular Individual and (b) the Murder of This Same Individual, As Well As, the RICO Conspiracy Itself on an Aider and Abettor Theory.

It is axiomatic that to fasten guilt on one accused of being a conspirator it is necessary to prove such person actually participated in the *charged* conspiracy. Also, the law is that a conspiracy to commit a substantive offense and aiding and abetting its commission are separate offenses. If it were otherwise, one simply could not be convicted of both. *See United States v. Tropiano,* 418 F.2d 1069, at 1083 (3d Cir. 1969), citing *Nye and Nisson v. United States,* 336 U.S. 613 (1949).

Therefore, the distinctions between the concept of "aiding and abetting" and that of "conspiracy" are, under the facts here most crucial. Doubtless, it was because the distinctions between the concept of "aiding and abetting" and that of conspiracy can be so very crucial that this court rather specifically admonished that the crime of "conspiracy" is not to be confused with the crime of "aiding and abetting". *Iannelli v. United States,* 420 U.S. 770, 777 n.10 (1975).

So postured, any argument contending that the various aiding and abetting instructions given to the jury were not hopelessly confusing would not only be specious, such an argument would be totally at odds with simple logic. This is especially so if the rule '. . . that one does not become a party to a conspiracy by aiding and abetting it . . .' *Id.*, at 709. See *United States v. Peoni,* 100 F.2d 401, at 402 (2d Cir. 1938); *United States v. Koch,* 113 F.2d 982, at 983 (2d Cir. 1940); *United States v. Ford,* 324 F.2d

950, at 952-953 (7th Cir. 1963) and *United States v. Greer*, 467 F.2d 1064, at 1070-1071 (7th Cir. 1972). These cases support the idea that more is required to become a conspirator than merely being a participant in the object substantive offense.

Given this circumstance, it is of no mean importance to note the court submitted to the jury alternative theories under which Licavoli could be held accountable for the substantive offense involving the death of Danny Greene. Simply put, the jury was told the requisite determination could be made on the basis of proof there was a *conspiracy* to kill Danny Greene and proof of Licavoli's membership in such conspiracy. *And*, they were also told that this determination could be predicated on an *aider and abettor* theory.

It is this distinction that makes our contentions on this issue so critical. For it could very well be that the jury believed that Licavoli *only* "aided and abetted" Ferritto's efforts to kill Danny Greene and that Licavoli was not privy to the conspiracy to kill Danny Greene. *Or*, the jury could have determined that Licavoli had only aided and abetted the conspiracy in the killing under circumstances that did not make him a conspirator. If either of these options actually reflects what was the jury's thinking then it just has to be that the verdict here cannot survive meaningful scrutiny because only one predicate act was shown. And, of course, if the jury convicted Licavoli of the RICO conspiracy itself on the basis of a belief that he somehow merely aided and abetted the murder conspiracy, then the verdict would be as incomprehensible as was the charge that allowed the conviction of Licavoli to happen in the first place.

The analysis made above must be validated if the Court agrees "the cases are clear that one may cause another to commit, 18 U.S.C. §2(b), or aid and abet its commission, 18 U.S.C. §2 (a), without being a conspirator

with the principal offender." *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978).

Given the above tenets and the Court's convoluted aiding and abetting instructions, the question that immediately arises (in the first instance) turns on whether the two predicate acts requirement of §1961 (5) can be satisfied by "proof" that Licavoli (1) aided and abetted the murder of Danny Greene. Assuming a negative answer to this question, is it nonetheless true that one can be convicted on a RICO conspiracy charge on the basis of proof he aided and abetted such a conspiracy?

V. A Charge That Exposes an Accused to Being Convicted by Less Than the Unanimous Concurrence of All the Jurors Violates the Sixth Amendment Rights of the Accused As Implemented by Rule 31 (A), Federal Rules of Criminal Procedure.

Under the instructions given by the Court, the jurors could have returned a less than unanimous verdict. This follows inasmuch as some of the jurors, but not all of them, might have only believed that Licavoli was guilty because he had indeed *conspired* to kill Danny Greene and the killing itself occurred in furtherance of such conspiracy. Others, rejecting Ferritto's testimony about the conspiracy, may have believed Licavoli *aided and abetted* the actual killing by the furnishing of alleged information about the Doctor's appointment. Indeed, this particular option was further complicated by the specific license given the jury to find Licavoli "committed the predicate act of conspiracy to murder" if it were determined that he either "planned *or aided* one or more defendants or co-conspirators in planning the commission of the Greene murder" (Emphasis supplied).

First of all, it cannot be overlooked that the point being specifically argued here was compellingly, in our judg-

ment at least, called to the Court's attention in full compliance with Federal Rules of Criminal Procedure, Rule 30.

Our point, at the trial and now, is that the court's unfortunate charge in which the jury was given these alternative theories of guilt exposed Licavoli to the very real danger of being convicted by less than the unanimous concurrence of all the jurors as to any specific theory of conviction.

The lack of unanimity issue here being urged was specifically dealt with rather recently by the Fifth Circuit in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). In *Gipson*, the Court aptly concluded that the right of an accused to a unanimous verdict was violated where, ". . . under the [court's] instruction, the jury was permitted to convict . . . even though there may have been significant disagreement among jurors as to what he did." *Id.*, at 458-459. In making this point, the Court termed superficial the argument, which also may be made in the instant case, that "since every juror was still required to find all elements of the charged offense present in order to convict the defendant, there was necessarily unanimous jury agreement as to . . . guilt". *Id.*, at 457.

VI. Where the Evidence in a RICO Conspiracy Prosecution at Best Shows an Accused Committed Only One of the Alleged Predicate Acts, or Offenses, Such Evidence Would Be Legally Insufficient to Support a Finding of Guilt.

The central contention made in this segment of our Petition is that the pattern requirement of two separate predicate acts could not be, and was not, established as against Licavoli for various specific reasons that emerge from the analysis made below. Our starting point is the indictment as against Licavoli, which ultimately charged

as *predicate acts* (1) a conspiracy to kill Danny Greene and (2) the murder of Danny Greene. These charges were based on asserted violations of the Ohio Revised Code, §2923.01 and 2903.01.

A. "Conspiracy to Murder" Cannot Properly Be Regarded As a Predicate Act in a RICO Conspiracy Prosecution.

The position argued below is that the conspiracy to murder offense relied on as a predicate act for the RICO conspiracy charge set forth in this indictment is not covered by 18 U.S.C. §1961 (1) because, under this section only substantive offenses can be shown as predicate acts. Also, the "two separate acts" requirement of §1961 (5), is not shown by proof of acts that are merely "legally distinct" as distinguished from being "factually distinct." This being so, the conspiracy to murder Greene and the murder of Greene must be regarded as having merged; so much so, that even if proved, could only be regarded as one predicate act. See *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981) and *United States v. Hernandez,* 591 F.2d 1019 (5th Cir. 1979).

The RICO Act originated in the Senate as S. 1623, 91st Cong., 1st Sess. (1969) (the "Criminal Activities Profits Act") and S. 1861, 91st Cong., 1st Sess. (1969) (the "Corrupt Organizations Act of 1969"). S. 1623 provided that persons who derived income from "criminal activity" and applied that income to the acquisition of a business enterprise shall be guilty of a crime. The original bill defined "criminal activity" as follows:

> The term "criminal activity means [as in the present statute] the various categories of offenses and specific statutes were listed . . . and (c) *any conspiracy to* commit any of the *foregoing offenses.* (Emphasis supplied.)

Id., at §2 (1). S. 1861 created criminal sanctions based on "racketeering activity" and "pattern of racketeering activity", with the former defined as follows:

> (1) The term "racketeering activity" means [as in the present statute the various categories of offenses and specific statutes were listed] . . . and (C) *any conspiracy to commit any of the foregoing offenses.* (Emphasis supplied.)

In the final version of the statute, *i.e.*, §1961 (1), subdivision (c) relating to conspiracy was deleted. As we see it, this fact plainly demonstrates Congress' intention not to make conspiracy a separate act of racketeering.

Also, it should be noted as persuasive that while the general conspiracy statute, 18 U.S.C. §371, is not listed, or otherwise described in §1961 (1), as an act of racketeering, conspiracy to violate any of the three subdivisions of 1962 (d) is so listed. Now the government will surely argue that conspiracy to murder is an "act or threat involving murder", conduct proscribed by 1961 (1) (A). This argument, however, should prove unavailing because the early drafts of the legislation, §1623 and 1861, included conspiracies as a separate offense and also used the word "involving". Stated another way, the absence of the word "involving" from §1961 (1) (B) and (C), which comprise the bulk of the listed offenses, cannot be regarded as significant absent some evidence Congress actually intended conspiracy to commit only those crimes listed in (A) and (D) should be regarded as predicate offenses and did not intend conspiracy to commit a welter of other offenses listed under (B) and (C), should be predicate offenses.

The closest case to the present issue—whether conspiracy to murder can be regarded as a predicate act in a RICO prosecution—is *United States v. Welch*, 656 F.2d 1039 (5th Cir. 1981). In *Welch*, the Court had before it the precise question here—that is, whether "conspiracy to

murder" can properly be regarded as a predicate act in a RICO prosecution. What is significant is that the Court in *Welch*, after resolving the appeal on a different basis, made the point that "it is not yet settled whether a charge of conspiracy to murder is a proper predicate for a RICO charge" *Id.*, at 1063 n.32.

In any event, whether conspiracy to murder (a charge based on the Ohio statute referred to above) could, under the facts of this case, be a predicate act was a most critical issue submitted to the courts below. Despite this fact, the Sixth Circuit's conclusory reasoning is exposed upon analysis to not only be defective but to have missed the point. Here the Court, in holding a conspiracy to murder could be a RICO predicate offense (*Licavoli*, at 1045, Appendix "B", at A7) failed to recognize the variance between its rationale and that expressed by the second circuit in *United States v. Weisman*, 624 F.2d 1118 (2d Cir. 1980), a case upon which it placed primary reliance. Also see *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983). In *Bagaric*, the Second Circuit credited *Weisman* with having articulated the idea that to be a predicate act to support a substantive RICO charge the "proof must be of consummated acts of Racketeering and not conspiracies or attempts, unless conspiracies or attempts to commit the substantive crimes are included within §1961 (1) (D)." *Bargaric*, at 62 n.17.

Also, it should be noted, the District Court correctly reasoned that the legislative history of the RICO statute provided the proper test for determining whether a State offense could be regarded as a predicate act. Simply put, according to that history "State offenses are included by generic designation," 1970 *U.S. Code Cong. and Ad. News*, 4032. This being so, it becomes understandable why the Sixth Circuit deliberately failed to mention the "generic designation" required by the legislative history in its analysis.

What makes the idea that the Sixth Circuit's omission of any reference to the test required by RICO's legislative history must have been deliberate so compelling is because under the "generic designation" test it is at once apparent that "a conspiracy offense is not the same as a murder offense. And, one who conspires to murder has not committed the murder itself." Tarlow, Vol. VIII, *The Champion* 57, at 58 (March 84).

Indeed, in specifically commenting on this flawed aspect of the Sixth Circuit's opinion, a leading authority in the area of RICO prosecutions made the following point:

> Oddly, Judge Kennedy acknowledged this principle in the context of her holding that murder and conspiracy to murder are separate offenses under Ohio law and may both be RICO predicate offenses. *United States v. Licavoli* [citation omitted]. This holding could not have been reconciled with the earlier holding on conspiracies as state law predicate offenses had the generic designation test been applied as required by the RICO legislative history. (*Ibid.*)

Hopefully then, this court will view the resolution of this issue in the courts below as one that ought to be fully investigated by this court.

B. Where the State Law Mandates Upon Conviction a Merger of the Conspiracy to Murder Charge With the Substantive Murder Offense, the Government Does Not, by Proving Both the Conspiracy to Murder and the Murder Itself, Establish Two Predicate Acts Sufficient to Satisfy the Requirements of 18 U.S.C. §1962 (d).

A fair reading of Ohio's conspiracy statute, particularly Ohio Revised Code, §2923.01 (G), shows that any conspiracy offense, including conspiracy to murder, Ohio Revised Code §2923.01 (A) (1) and (2), must be re-

garded as an inchoate offense that merges into the particular substantive, or principal, offense involved when one is *convicted* of such offense. Also, Ohio Revised Code, §2923.01 (F), declares that one "who conspires to commit more than one offense is guilty of only one conspiracy when such offenses are the object of the same agreement or continuous conspiratorial relationship."

As applied here, this statute mandated the conclusion actually reached by the trial Judge that any conspiracy, here, to kill *Greene and Nardi* simply could not be fragmented into two (2) predicate acts by the government in its quest for a RICO conspiracy conviction. The trial court in dealing with this particular aspect of our contentions actually agreed (Appendix C, at A38).

While the Court was certainly correct in the above holding, there were other serious flaws in the Court's overall rationale. These include several that were recognized in Barry Tarlow's analysis of the decision below in Vol. VI. No. 7, *The Champion* (August, 1982) pp. 3 and 10. Here it was reasoned that "the refusal to apply §2923.01 (G) is arguably inconsistent with the Court's . . . holding that Ohio Law governs the merging of the two murder conspiracies into a single murder conspiracy." *Id.*, at 10. This was said to be so because, as Tarlow saw it, the state statute concerning multiple conspiracies, §2923.01 (F), "was part of the same statute relating to the merger of substantive and conspiracy offenses". *Ibid.*

Our argument that the trial court's merger argument misses the mark is strengthened by the analysis given the merger concept in *United States v. Phillips*, 664 F.2d 971, 1038-1039 (5th Cir. 1981). In *Phillips*, the court discussed the post-verdict acquittal granted one of the defendants, Echezarreta, and found that there was a merger of the only offenses involved as against Echezarreta. In arriving at this conclusion, the *Phillips* court, which was dealing

with the charges of possession with intent to distribute and the actual distribution of marijuana, reasoned that inasmuch as "possession with intent to distribute and actual distribution merged into one, there was no separate crime performed in furtherance of the conspiracy's objective that would constitute the necessary second act of racketeering" *Id.*, at 1039. The Court's authority for this position was said to be that Circuit's decision in *United States v. Hernandez*, 591 F.2d 1015 (5th Cir. 1979) (*en banc*). There the Court had held, in language that truly applies to the present case, that "[w]hen the intent to distribute was executed by a successful sale, the possession with intent to do so merged into the completed offense." 591 F.2d, at 1022.

C. The Requirement Under 18 U.S.C. 1961 (1) (A) That a State Offense Must Be "Chargeable and Punishable by Imprisonment for More That One Year" to Qualify As a Predicate Act Means Chargeable and Punishable at the Time of the Indictment, and It Means Separately Punishable From Any Other Related or Interrelated Offense.

Although the Courts may have properly rejected our argument that Licavoli's acquittal was a bar to any further effort by the government to relitigate the issue as to his asserted involvment in the murder of Danny Greene, their dual sovereignty analysis simply does not conclusively resolve the issues as to the extent "predicate acts" in a RICO prosecution can be based on state offenses for which there has been acquittal. See, *e.g.*, *Licavoli*, 725 F.2d, at 1047; Appendix B, at A17.

Here it should be noted §1961 (1) (A) requires that state offenses, if they are to serve as predicate acts, must be "chargeable under state law and punishable by imprisonment for more than one year." Indeed it has been

specifically noted, although in dissent, that after an acquittal in state court, the offense involved is neither "chargeable" nor "punishable" by more than one year imprisonment. *United States v. Frumento,* 563 F.2d 1083, 1097 (3d Cir. 1977) (*cert. denied,* 434 U.S. 1072 [1978]). Also see *United States v. Davis,* 576 F.2d 1065, 1068-1071 (3d Cir. 1978) (concurring opinion). Significant too is the fact that the majority in *Frumento* reasoned the role of state offenses in a RICO prosecution was merely "definitional" and served only to identify the proscribed unlawful conduct. *Id.,* at 1087 n.8A. The Courts below have fully adopted this thesis (See Appendix B, at A11.) In reaching this (farfetched in our judgment) conclusion the majority in *Frumento* specifically rejected the position here being taken, although its logic seems irresistible.

This argument relies, as we do, on *United States v. Mason,* 213 U.S. 115 (1909), for the proposition that an acquittal in state court must be deemed controlling where the subsequent federal prosecution is based on a state statutory offense. This rule is predicated on the idea that a state court's interpretation of state law is always binding on Federal Courts. Indeed, the law on this point is so clear it caused this Court to recognize it lacks the power to correct a state court's construction of state law. *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945). Also *see Huntington v. Attrill,* 146 U.S. 657, 669-673 (1892) for the proposition that "crimes and offenses against the laws of any state can only be defined, prosecuted and pardoned by the sovereign authority of that state".

This brings us to the critical holding in *United States v. Mason, supra.* There the Court, in clear and unambiguous language, proclaimed that:

> As a general rule, the Federal courts accept the judgment of the state court as to the meaning and scope of a state enactment, whether civil or criminal. Much

> more should the Federal court, it becomes material to inquire whether that particular crime against the State was committed by the defendants on trial in Federal court for an offense against the United States. 213 U.S., at 125.

It follows from *Mason* that the Courts below were obligated to defer to the State Court verdicts in favor of Licavoli.

CONCLUSION

Judge Merritt, in his concurring opinion below, perhaps said it best when he noted that:

> It may seem strange for a federal court to uphold convictions under a federal statute based on two underlying predicate state offenses for which a defendant has either been acquitted at state trials (the murder of Danny Greene) or for which he could not be separately convicted or punished under state law (conspiracy to murder Danny Greene).

While it may indeed seem only strange to Judge Merritt, for our part strange is really not a strong enough word. For if Licavoli could be properly convicted on the basis of the facts here then truly the Government can require any one of us to either run a gauntlet or subject themselves to trial by ordeal.

With all the considerations involved in this case in mind surely this court can see its way to reviewing this conviction.

Respectfully submitted,

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